No. 49366-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NICHOLAS MORTENSEN, an individual,

Appellant,

v.

DREW JAMES CORPORATION, d/b/a Main Street Bar & Grill, a for profit corporation, and GUITRON ESTRADA, II, INC., d/b/a Rancho Viejo Sports Bar, a for profit corporation,

Respondents,

and

ROBERT MORAVEC, an individual; and
JOHN/JANE DOES 1-99 including Bartenders,

Defendants.

BRIEF OF APPELLANT

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A. INTRODUCTION

Despite well-developed principles of law to the contrary, the trial court concluded that Drew James Corporation d/b/a the Main Street Station Bar & Grill ("Main Street"), and Guitron Estrada II, Inc. d/b/a/ Rancho Viejo Sports Bar ("Rancho Viejo") (collectively, "the bars") owed no duty to Nicholas Mortensen when the bars overserved Robert Moravec, who had been drinking for hours and was apparently under the influence of alcohol, and Moravec later accidentally shot his friend Mortensen, rendering him a paraplegic.

Under those well-developed principles, the bars owed Mortensen a duty not to overserve Moravec, who was apparently under the influence of alcohol. They also owed him common law duties regarding overservice of patrons who are in a state of helplessness, and to protect patrons from other patrons.

This Court should reinstate Mortensen's claims against the bars and allow them to proceed to the jury.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the bars' motions for summary judgment by its orders entered on July 26, 2016.

2. The trial court erred in denying Mortensen's motion for

summary judgment by its orders entered on July 26, 2016.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in concluding that bars, commercial purveyors of alcohol, did not owe a common law duty to a patron injured in a firearms accident by a fellow patron that the bars had served when he was intoxicated, patently under the influence of alcohol, to the extent that he was deprived of responsibility for his behavior? (Assignments of Error Numbers 1 and 2).

2. Did the trial court err in concluding that bars, commercial purveyors of alcohol, did not owe a duty as set forth in RCW 66.44.200 to a man injured in a firearms accident by patron the bars served when he was apparently under the influence of alcohol? (Assignments of Error Numbers 1 and 2).

C. STATEMENT OF THE CASE

On the evening of April 10, 2015, in Battle Ground, Washington, a group of friends including plaintiff Nick Mortensen, Robert Moravec, Matt Thompson, Eddie Cresap, and Aral Pierce began drinking at Moravec's residence, describing such conduct as "pre-funking." CP 51. The group left the Moravec residence and went one mile to the Main Street where they continued drinking. CP 28, 47, 50-52. After many hours of drinking at Main Street, another friend, Tyler Rua, who arrived from work at approximately 8:30 p.m., joined the group. CP 456. Rua described Moravec's condition at that time as being "intoxicated" and that he was "slurring his words." CP 446.

Rua, Moravec, and their friends continued drinking at the Main

Street where Moravec was served, beer, mixed drinks, and shots at Main Street for five more hours. CP 28, 47, 50-52, 411. Moravec corroborated the testimony of his apparent intoxication at Main Street admitting that when he left Main Street, he was "intoxicated enough not to drive," and intoxicated enough that he wanted to avoid being stopped for "public intox." CP 450.

At approximately 1:00 a.m., the group, now heavily intoxicated, left the Main Street and went to an adjacent bar, the Rancho Viejo. CP 52, 412, 456. At the Rancho Viejo, Moravec met Danielle Kerner, a woman with whom he had been intimate in the past. CP 453. Moravec spent the remainder of the evening drinking at the Rancho Viejo with Kerner and the rest of his group. CP 28-29, 52. Kerner testified that it was clear to her that Moravec was intoxicated at the Rancho Viejo. CP 453. Rua testified that Moravec was obviously intoxicated at *both* bars. With regard to Moravec's appearance at the Main Street, Rua stated:

> Robert Moravec was obviously intoxicated when I arrived. I am 21 years-old, have seen many intoxicated people and know when someone is drunk. His eyes were bloodshot and glassy, he was swaying slightly back and forth, and his voice was louder than was appropriate for the situation.

CP 24. At the Rancho Viejo, Moravec was similarly obviously impaired:

> Just before, 1:00 a.m. our party went to the El Rancho Sport Bar. At that time everyone other than me in our

> group was intoxicated. Robert Moravec was even more obviously intoxicated than he was when he was drinking at Main Street Bar and Grill. His eyes were even more glassy and bloodshot, his speech was slurred, he was swaying back and forth and was speaking more loudly than appropriate.

CP 25.

Again, Moravec corroborated this testimony with his own admission that he was more intoxicated at the Rancho Viejo than at the Main Street and that at a certain point he "blacked out" from his excessive alcohol consumption. CP 175-77, 464.

Kerner testified that near closing time she and Moravec went to his home together in her car while the other members of the group walked to Moravec's house. CP 412. Moravec was so intoxicated that he only remembers waking up in the back of Kerner's car, but not how he got into the car or who was in the car initially. CP 467-68.[1]

When Kerner and Moravec arrived at Moravec's house, the rest of the group was already there. CP 413. Thompson, Moravec's roommate, had to work the next day, and he was already in bed in his room. *Id.* Cresap was so drunk he had passed out on the living room couch. *Id.*

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[1] In sum, the group's drinking at the bars began at about 5:45 p.m. CP 47 (printout of receipt from defendant's party at Main Street Bar and Grill with a timestamp of 5:37 p.m.). They first drank at the Main Street for approximately *seven hours* and then moved to Rancho Viejo, where they drank for *an additional 90 minutes* until near closing time, 2:00 a.m.). CP 50-52. Battle Ground Detective Kelly testified that the two bars were perhaps the "most problematic" bars for problems in the area he served. CP 586.

Mortensen, Pierce, and Rua were awake and hanging out. *Id.* Shortly after arriving at the home, Kerner and Moravec went into his bedroom. CP 496, 499. Pierce, Rua, and Mortensen did not think that Moravec should be going to bed with Kerner so the three began to joke around to try and prevent Moravec from going to bed with Kerner. *Id.* Kerner described the joking as follows:

> Yeah. He (Moravec) went out into the hallway. He had shut the door, and he was messing around with them (Rua, Aral). I mean, you could tell they were joking, you could hear laughing and stuff too. And then he had came back into the room I think only once, and then -- yeah, he came back, went back out because they kept doing it, and that's when he came in and grabbed the gun.

CP 471. Rua, Pierce, and Mortensen banged on the walls and hooted and hollered, but there was no animosity among the group of friends; the hooting and hollering were described as "innocent fun." CP 474. "We were all just joking around having a good time." CP 477.

Just 40 minutes after leaving the Rancho Viejo, Moravec went into his room, picked up his gun that he believed was unloaded, stepped into the hallway, and waved the gun down the hallway at his friends. CP 483-84. Suddenly, and much to his surprise, the gun went off, shooting Mortensen. *Id.*[2] Every single witness in this case, including the

[2] Moravec's house had numerous guns; he was an experienced gun owner who had been trained and told on many occasions to treat every firearm as if it were loaded.

investigating detective, testified that this shooting was an accident. CP 487, 490, 493, 496, 499. He was "just kind of screwing around with the gun." CP 560, 562.

After Mortensen was shot, his friends called 911 and administered first aid until the police and ambulance arrived. CP 414. A Battle Ground Police officer who first arrived at the scene described Moravec in the police report as follows:

> During my contact with Moravec, I could smell a strong odor of intoxicant coming from his person. His eyes were bloodshot and his speech was noticeably slurred. He made comments about drinking at El Ranch Sports Bar [Rancho Viejo] with friends earlier in the evening. Moravec asked me if I wanted him to blow into a PBT. He informed me that he knew he was intoxicated and "just wanted to be as honest and cooperative as possible."

CP 188. The same officer gave a portable breath test ("PBT") to Moravec; the PBT's result was a .177 BAC, over twice the legal limit. CP 189, 501.[3]

Moravec's shooting of Mortensen resulted in Mortensen's

CP 414. He testified that he would never have made the negligent decision to point a gun at his friends if he had been sober. In describing how the incident happened, he stated:

> Like I said, I've had firearms for eight years. And it was just -- I was being a drunk fucking idiot.

CP 480.

[3] Moravec was subsequently charged with, and pled guilty to, Assault in the 3rd degree; RCW 9A.36.031(d). CP 758-72. A key element of that crime is that the offender, "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."

paralysis from the waist down. CP 5.

Mortensen filed the present action in the Clark County Superior Court against Moravec and the bars on October 6, 2015. CP 1-13. The case was assigned to the Honorable Bernard F. Veljacic.

Mortensen and the bars filed motions for summary judgment. CP 27-39, 350-72, 395-402. The trial court granted the bars' motion and denied Mortensen's on July 26, 2016. CP 775-80. The trial court concluded that the bars owed no duty to Mortensen. The court appeared to base that determination on the notion that a bar only has liability for overserving an adult patron if that patron then goes out and commits harm in a motor vehicle; the bar has no liability for any harm caused by the overserved adult patron committing harm with a firearm. RP (7/26/16):35-39.

This timely appeal followed.[4]

D. SUMMARY OF ARGUMENT

RCW 66.44.200 establishes a duty for commercial sellers of alcohol, prohibiting them from serving any person who is apparently under the influence of alcohol. Additionally, the common law establishes a duty on the part of commercial sellers not to overserve a patron to the

[4] Subsequent to the filing of the notice of appeal, Mortensen dismissed his complaint as to Moravec under CR 41.

point of helplessness and to protect patrons from other patrons. Commercial alcohol sellers are liable to third persons injured as a result of the actions of the overserved person under these well-developed Washington law principles.

It is undisputed that the bars here overserved Robert Moravec who then accidentally shot Nicholas Mortensen, rendering him a paraplegic. Such an accident was an entirely foreseeable consequence of the bars' overservice of Moravec to the point of his blacking out from inebriation, given Washington public policy on firearms and alcohol, and public health data indicating the prevalence of firearms accidents when alcohol is involved.

This Court should reverse the trial court's summary judgment orders in favor of the bars and remand the case to the trial court to afford Nicholas his day in court.

E. ARGUMENT[5]

(1) Washington Law on the Overservice of Adult Bar Patrons

Washington law on the civil liability of commercial sellers for the

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[5] Summary judgment is proper only if there is no genuine issue of material fact and the bars were entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). This Court reviews the facts and reasonable inferences from the facts in a light most favorable to the violence victims as the non-moving parties on summary judgment. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Thus, Mortensen's contention that the shooting here was an accident must be credited for purposes of review. This Court reviews the trial court's summary judgment orders *de novo*. *Id.*

overservice of plainly inebriated patrons who harm third parties is animated both by common law and statutory principles.[6] Put another way, the bars here had a duty to Mortensen based either on general common law principles or statute.

(a) Common Law Duty

The common law generally provided that it was not a tort to sell alcohol to "ordinary able-bodied men" because the selling of liquor to such individuals could never be a proximate cause of any harm arising from its consumption. However, a duty was owed by such establishments to avoid serving a person in such a state of "helplessness or debauchery" as to be deprived of responsibility for his or her behavior. *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 762, 458 P.2d 897 (1969). This common law standard evolved in subsequent cases. Commercial providers, but not social hosts,[7] could be held liable for overserving

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[6] Commentators have justly criticized the case law applying this amalgam of common law and statutory principles as being less than coherent. *E.g.*, Robert W. Gomulkiewicz, *Recognizing the Liability of Social Hosts Who Knowingly Allow Intoxicated Guests to Drive: Limits to Socially Acceptable Behavior*, 60 Wash. L. Rev. 389 (1985); Theresa J. Rambosek, *A Wavering Line? Washington's Rules of Liability for Furnishers of Alcohol*, 24 Gonz. L. Rev. 167 (1988/89); Sheldon H. Jaffe, *What a Long Strange Trip It's Been: Court-Related Limitations on Rights of Action for Negligently Furnishing Alcohol*, 72 Wash L. Rev. 595 (1997); Kathryn Knudsen, *Serving the "Apparently under the Influence" Patron: The Ramifications of Barrett v. Lucky Seven Saloon, Inc.*, 31 Seattle U. L. Rev. 385, 391-92 (2008).

[7] Based largely on the common law analysis, Washington courts held that social hosts are not liable third parties for overserving adults. *Burkhart v. Harrod*, 110 Wn.2d 381, 755 P.2d 759 (1988). The Court there held the common law rules apply only to

obviously intoxicated individuals to third persons harmed by such overservice. In *Shelby v. Keck*, 85 Wn.2d 911, 916-17, 541 P.2d 365 (1975), the Court recognized several distinct exceptions to the common law rule expressed in *Halvorson*. In *Wilson*, 98 Wn.2d at 438, the Court amplified on the several exceptions to the non-liability principle, stating that the *Halvorson* court "simultaneously [recognized] the exceptions to that rule for obviously intoxicated persons, persons in a state of helplessness, or persons in a special relationship to the furnisher of intoxicants." *Id.* In both *Young v. Caravan Corp.*, 99 Wn.2d 655, 663 P.2d 634 (1983) and *Purchase v. Meyer*, 108 Wn.2d 220, 737 P.2d 661 (1987), the Supreme Court addressed the liability of commercial providers for serving a minor, differentiating between common law remedies relating to overserving an obviously intoxicated minor and remedies arising out of statutory prohibitions on serving a minor.

With regard to the exception for overservice of a person who is "obviously intoxicated," that common law exception was ultimately

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commercial providers or "quasi-commercial hosts" because (1) social hosts are less able to monitor their guests' consumption; (2) social host liability would have a more wide-spread and unpredictable impact on social host behavior or upon personal relationships and; (3) the Legislature had expressed an intent to avoid social host liability by repealing the Dram Shop Act. "Quasi commercial" involves situations where the event is social, but it has a commercial reason for occurring. *See Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986) (company held banquet to honor long-time employees and overserved employee). As commercial alcohol sellers, the bars here were fully capable of monitoring Moravec's alcohol consumption and behavior, particularly given Washington's mandatory training law for its servers described *infra*.

replaced by the statutory standard of overserving a person "apparently under the influence" of alcohol. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 274-75, 96 P.3d 386 (2004); *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). That statutorily-based standard is discussed *infra*. However, no subsequent case holds that the other recognized common law grounds for a commercial seller's overservice have been superseded.[8]

The common law also recognized that commercial liquor providers have a duty to prevent patrons from harming one another. In *Waldron v. Hammond*, 71 Wn.2d 361, 428 P.2d 589 (1967), the Supreme Court made clear that a tavern or bar owes a duty to its patrons to exercise reasonable care to protect them from foreseeable harms at the hands of other patrons. *Id.* at 362. The Court held that a bar owed a duty to a patron who was assaulted by another patron, affirming a jury verdict for the plaintiff. *See also, Miller v. Staton*, 58 Wn.2d 879, 356 P.2d 333 (1961) (patron knocked down by two other bar patrons); *Gurren v. Casperson*, 147 Wash. 257, 265 Pac. 472 (1928) (female at hotel was assaulted by another guest who was intoxicated). In *Christen v. Lee*, 113 Wn.2d 479, 504-07, 780 P.2d 1307 (1989), the Supreme Court recognized that a bar patron injured

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[8] As noted in the comment to WPI 370.01, 6A *Wash. Practice* at 612: "It is ... not entirely clear whether the common law's obvious intoxication standard has been fully replaced, or has merely been replaced to the extent that the statute [RCW 66.44.200] applies to a given case."

by another's assault with a firearm stated a claim against a bar for failing to protect him. The Court held any issues of foreseeability and proximate cause were for the jury.

Here, three distinct common law grounds for the bars' duty to Mortensen are present. The first basis – overservice of a person who is obviously intoxicated – has been supplanted by statute, as will be discussed *infra*.

The second – service of a person to a state of helplessness – remains viable in this case. The bars allowed Moravec to consume alcohol over a period of 8.5 hours *to the point that he blacked out*. No adult could continue to consume alcohol in the amount Moravec consumed nor over the period he consumed that alcohol and be anything other than hopelessly inebriated. Little wonder that a firearms accident ensued.

Finally, the bars had a common law duty under *Waldron* and *Christen* to protect bar patrons like Mortensen from the foreseeable harm of other bar patrons like Moravec. The bars were on notice of Moravec's potential risk, given the testimony of his obvious intoxication, boisterous, loud behavior, stumbling, slurred speech. Moreover, given the quantity of alcohol consumed over the long time periods in the bars, the bars' servers, properly trained under Washington law, could not help but be aware of

Moravec's behavior and intoxication. They let him continue to drink.

In sum, the trial court erred in finding no common law duty here.

(b) Statutory Duty

Washington law has long made it a crime for a bar or restaurant to serve a person who is apparently under the influence of alcohol. RCW 66.44.200(1). ("No person shall sell any liquor to any person apparently under the influence of liquor."). To effectuate that public policy, the Washington Legislature enacted a law in 1995 to train Washington alcohol servers in spotting intoxicated patrons.[9]

Because the common law established a duty for commercial

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[9] RCW 66.20.300-.350 directs the Washington Liquor and Cannabis Control Board to establish a mandatory alcohol server training program. No person in Washington may serve alcohol without obtaining a server permit. RCW 66.20.310(2)(c); the training program is required before such a permit may be issued. RCW 66.20.320(2). The Legislature's purpose in enacting such a program was as follows:

> The Legislature find that education of alcohol servers on issues such as physiological effects of alcohol on consumers, liability and legal implications of serving alcohol, driving while intoxicated, and methods of intervention with the problem customer are important in protecting the health and safety of the public. The Legislature further finds that it is in the best interest of the citizens of the state of Washington to have an alcohol server education program.

Laws of 1995, ch. 51, § 1. The Board adopted regulations setting forth the requirements for the mandatory training program. Ch. 314-17 WAC. The rules distinguish between Class 12 and Class 13 permits. WAC 314-17-015. Class 12 permitees are bartenders while Class 13 permitees are largely servers. The training curriculum for either permittee requires training in the physiological effects of alcohol, RCW 66.20.320(1)(d)(i), and liability and legal information, RCW 66.20.320(1)(d)(ii); WAC 314-17-060(1). The Board's handbook for liquor licensees, which includes a discussion of the signs of intoxication that licensees and their employees must know can be found at www.liq.wa.gov/publications/onpremiseslicenseehandbook.pdf. *See* Appendix.

alcohol providers not to overserve "obviously intoxicated" patrons, the Supreme Court did not initially predicate liability for commercial establishments to adults on the basis of the statutory duty not to overserve. However, in *Estate of Kelly by and Through Kelly v. Falin*, 127 Wn.2d 31, 38-39, 896 P.2d 1245 (1995), the Court appeared to recognize that RCW 66.44.200 could constitute a basis for liability of commercial sellers to third person when a patron was overserved even though the Court concluded the statute was not intended to protect the patron who chose to consume the liquor to excess.

Later, the Court abandoned the common law rule for commercial provider overserving an "obviously intoxicated" person entirely, and adhered to the specific language of RCW 66.44.200(1) in a case where a saloon overserved a patron, and that patron drove his car and was involved in an accident that seriously injured the plaintiff. *Barrett, supra*.[10] There, the Court reversed a judgment for the commercial alcohol provider where the trial court refused to instruct the jury in the language of the statute and instead gave an instruction that the saloon's liability could follow only if it

[10] The Court believed the "apparently under the influence" and "obviously intoxicated" standards differ, with "apparently under the influence" being a less stringent, less certain standard than "obviously intoxicated." 152 Wn.2d at 267-69. *See* WPI 370.01. *See also, Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 814 P.2d 687 (1991), concluding the statutory standard of "apparently under the influence" is less stringent than the older common law standard. *Id.* at 435.

served alcohol to an "obviously intoxicated" person.[11] As stated in Knudsen at 391-92: "The majority's opinion in *Barrett* elevated a commercial vendor's duty by requiring reflection and inquiry into whether a person is under the influence at the time of service."

Thus, after *Barrett*, the statutory language of RCW 66.44.200(1), rather than the common law, describes the duty owed by commercial establishments not to overserve patrons.

In sum, in addition to the common law duty owed by the bars described *supra*, the bars had a duty arising out of RCW 66.44.200(1) not to overserve Moravec where he was apparently under the influence of alcohol. That duty of care extended to adult third persons like Mortensen.

(2) The Bars Owed a Duty to Mortensen With Regard to the Firearm Accident that Devastated His Life

The bars argued to the trial court that they owed no duty to

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[11] While the test for civil liability is based on the patron's appearance to the server, the Court liberalized the evidence relevant to such an analysis. Proof of a person being apparently under the influence at a bar may be established by circumstantial evidence or by blood alcohol tests. In *Faust*, *supra*, the Supreme Court held that apparent intoxication must be judged at the time of the patron's service, but both direct and circumstantial evidence that addresses the patron's appearance was relevant, and certain post-service evidence could be pertinent to that analysis as well. *Id.* at 539-41. Blood alcohol test results could be admissible in that regard. 167 Wn.2d at 542. Even under the old "obviously intoxicated" test, however, cases held that forensic evidence such as BAC test results could be admitted to confirm observational testimony. *See, e.g., Cox v. Key Restaurant U.S., Inc.*, 86 Wn. App. 239, 250, 935 P.2d 1377, *review denied*, 133 Wn.2d 1012 (1997). Moreover, in some instances, cases held that evidence garnered after the harm caused by the drunk driver was admissible to allow a jury to infer what the appearance of the drunk driver was at the commercial establishment. *Dickinson*, 105 Wn.2d at 457; *Fairbanks v. J.B. McLoughlin Co., Inc.*, 131 Wn.2d 96, 929 P.2d 433 (1997).

Mortensen as a matter of law. The bars also contended that they did not owe Mortensen a duty because Moravec's conduct was unforeseeable as a matter of law. The trial court agreed, dismissing Mortensen's claims against them. CP 773-74; RP (7/26/16):38-39. This was error.

(a) The Nature of the Bars' Duty

The bars owed Mortensen a duty of care not to overserve Moravec. First, the trial court overlooked the common law duty owed by the bars to Mortensen arising out of their overservice of Moravec to his point of helplessness and their duty to protect Mortensen from Moravec discussed in *Waldron* and *Christen*.

Second, the trial court misperceived the duty of the bars arising out of RCW 66.44.200(1). There is no question that the bars had a legal obligation not to overserve Moravec. The issue here is the duty the bars owed to Mortensen.

RCW 5.40.050 abolished the doctrine of negligence *per se* in Washington generally, but that statute makes clear that the breach of a duty created by statute, ordinance, or regulation is evidence of negligence.[12] To determine the scope of the duty owed by a statute, the Supreme Court has often invoked the *Restatement (Second) of Torts* § 286

[12] The 2009 Legislature restored negligence per se for "driving while under the influence of intoxicating liquor or drug." RCW 5.40.050.

test, applying it in *Christen*, *Hansen v. Friend*, 118 Wn.2d 476, 824 P.2d 483 (1992), and *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). In *Barrett*, the court reaffirmed that the statutory standard may be used to establish a civil duty if the four-part test from the *Restatement (Second) of Torts* § 286 (1965) is met. Under that test, a court must analyze whether the Legislature intended the statute "(a) to protect a class of persons which includes the one whose interest is invaded, (b) to protect the particular interest which is invaded, (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results." *Barrett*, 152 Wn.2d at 269. The Court applied the *Restatement* test and concluded that the statutory standard applies when a third party plaintiff is injured in an automobile accident caused by a commercial host's alleged overservice of an adult patron.[13]

Applying the *Restatement* test here, the bars owed a duty to Mortensen. RCW 66.44.200 was intended to protect third persons from the adverse impact of overserving liquor to persons apparently under the influence like Moravec. The particular interest – the health and safety of

[13] By contrast, the *Kelly* court held that an analysis of the common law duty compels the conclusion that any duty owed by commercial sellers is limited to third parties, and not to the overserved patrons themselves. *Kelly*, 127 Wn.2d at 37-42. The *Kelly* court reasoned that the common law did not go so far as to allow the overserved patron to recover. Such a limitation on a commercial seller's duty is not present here as Mortensen was a third person affected by the bars' overservice of Moravec.

Nicholas Mortensen – was an interest contemplated by the Liquor Act generally and RCW 66.44.200; RCW 66.08.010 states that the Act is designed to protect the health and safety of Washington's people and must be "liberally construed" to accomplish that purpose. The Legislature also contemplated protecting people like Mortensen from firearm injuries, as will be discussed *infra*. The particular harm – firearms accidents – was also contemplated in statutes barring firearms in liquor dispensing establishments. Ultimately, the issue here boils down to whether the bars could reasonably anticipate that Moravec might misuse a firearm, just as he might misuse another instrumentality – a motor vehicle. Plainly, they should have, and that determination is one for a jury.[14]

(b) Mortensen Was Foreseeably Injured by the Bars' Overservice of Moravec

The scope of any duty under the common law or RCW 66.44.200 is circumscribed by principles of foreseeability.[15] There is little question

[14] It is highly likely that the bars will contend that *Chapman v. Mayfield*, 361 P.3d 566 (Or. 2015), an Oregon case, should control here. It does not. There, the bar overserved a visibly intoxicated patron who left the bar and intentionally shot persons through a doorway of a nearby business. The Oregon Supreme Court affirmed dismissal of the shooting victims' complaint on the grounds that such a criminal assault was unforeseeable as a matter of law. That court's decision was predicated upon Oregon common law principles that are distinct from the common law/statutory duty owed by commercial alcohol providers in Washington.

[15] The trial court's foreseeability analysis trenches upon a proximate cause analysis. Proximate cause consists of both "but for" causation and legal causation. *Schooley*, 134 Wn.2d at 478. "Cause in fact concerns 'but for' causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not

that the bars owed a duty arising out of RCW 66.44.200 not to serve Moravec and such a duty extended to persons like Mortensen if the harm from the overservice was foreseeable. As the Supreme Court recently reaffirmed in *Volk v. DeMeerLeer*, ___ Wn.2d ___, ___, ___ P.3d ___, 2016 WL 7421397 (2016), foreseeability is a question of fact. "Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable." *Joyce*, 155 Wn.2d at 315. Whether the harm to Mortensen from the bars' service was foreseeable should have been resolved by a jury, not the trier of fact.[16]

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occurred." *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.3d 400 (1999). It has long been a cardinal principle of Washington law that proximate causation – "but for" causation – is generally a fact question for the jury. Even in circumstances where the harm experienced by the plaintiff is arguably attenuated from the breach of duty by the defendant, Washington courts have held proximate cause decisions are for the jury. For example, in *Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969), Rikstad was sleeping in a depression in tall grass surrounding a not regularly established campground after drinking to excess with Holmberg. After Rikstad went to sleep, Holmberg drove his truck across an open filed and ran over Rikstad, killing him. The Supreme Court reversed a judgment as a matter of law in favor of Holmberg. The Court concluded proximate cause, as well as foreseeability of the harm arising from Holmberg's actions, were for the jury. Similarly, in *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005), Vernon Stewart, a person with a long history of criminal conduct and psychiatric problems, was under Department of Corrections supervision for his latest felony convictions. The Department's supervision was egregiously negligent: Stewart failed to obey the conditions of his community supervision. *Id.* at 310-14. While on supervision, Stewart stole a car in Seattle, drove to Tacoma, ran a red light there, and smashed his stolen car into the car operated by Paula Joyce, killing her. *Id.* at 309. The Court not only found the State owed Joyce a duty, it reaffirmed that "but for" causation is a *question of fact* for the jury that "may be determined as a matter of law only when reasonable minds cannot differ." *Id.* at 322.

[16] The Supreme Court's decision on foreseeability as both an element of duty and a limitation on the scope of duty in *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015) does not alter the foregoing analysis. Foreseeability here is not an element of the duty owed to Mortensen, it is a limitation on the scope of the

Firearms accidents are within the field of danger of overserving bar patrons. *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999); *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953). Summary judgment was inappropriate here because at a minimum, viewing the facts in the light most favorable to Mortensen, there was a genuine issue of material fact as to whether the harms he experienced were foreseeable. It is fully foreseeable that an intoxicated person may, as a result of such intoxication, misuse dangerous instrumentalities, whether a motor vehicle, or a firearm, and accidentally harm others.

The cases on commercial seller liability beginning with Justice Finley's concurring opinion in *Halvorson* have focused on foreseeability as a limitation on the seller's liability to third persons. Nothing in the common law/statutory duty analysis compels the conclusion that bars are immune from liability after overserving obviously intoxicated patrons if those patrons then harm third parties with firearms rather than with motor vehicles.

The trial court misread the Supreme Court's decisions in *Shelby* and *Christen*. In *Shelby*, the wife of a man accidentally killed by a

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bars' duty. Thus, it is a jury question. Proximate cause, like foreseeability, was properly a jury question.

cocktail lounge patron's unloading of a gun sued the cocktail lounge because it failed to protect her husband. The Supreme Court affirmed the trial court's dismissal of the action. Keck was not overserved at the cocktail lounge, consuming only two drinks over two hours while there; he never became disorderly, although it was learned after the incident that the patron had a .16 BAC reading. The case was tried under the common law duty of commercial alcohol purveyors to protect their patrons discussed in *Waldron*. Although the patron had been asked to leave the lounge three weeks earlier for another firearm incident, the Court concluded the lounge had no notice of the patron's potentially harmful use of the weapon that would indicate his misconduct was foreseeable. *Id.* at 915-16. Moreover, under the other facet for a common law duty – overservice of an obviously intoxicated patron – the Court concluded that no evidence supported the argument:

> … we find that there was no competent evidence, nor any reasonable inference which would arise therefrom, to support a finding that the defendant's employees had notice that they were furnishing liquor to an individual who was intoxicated, let alone one who had lost his will-power or who was so inebriated as to no longer be held responsible for his conduct.

Id. at 917.

In *Christen*, the Supreme Court addressed two cases, one dealing with an assault at a bar by one patron upon another and the other involving

the overservice of a minor at a bar who injured a third person. The former is more relevant to this analysis. Applying common law principles in that case, the Court concluded that there was insufficient evidence that the assaulting patron was obviously intoxicated. Additionally, the Court concluded that no duty was owed as the harm to the other patron was not foreseeable. The Court reaffirmed that the "concept of foreseeability limits the scope of the duty owed." 113 Wn.2d at 492. The harm must be within the general field of the danger covered by the defendant's duty, a jury question. *Id.* While assault could be a foreseeable result of overserving a patron, that is true only if the seller had notice of the possibility of harm from the current conduct or prior actions of the patron. *Id.* at 491, 498.[17] The Court did not believe the possibility of a stabbing of a patron as they were walking along a highway after leaving the bar was something of which the bar had any notice. *Id.* at 498. *See* WPI 370.05.[18]

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[17] The *Christen* court's decision on the scope of duty is not surprising. The principles for the foreseeability of an assault, as opposed to negligent conduct, are different. In *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), the Court declined to impose liability upon an employer for the assaultive behavior of a special needs student against a teacher. The Court concluded that such behavior simply could not be predicted with certainty. *Id.* at 33-34.

[18] Similar notice principles apply to the negligent entrustment of a dangerous instrumentality to persons who might misuse them. In *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 729, 653 P.2d 280 (1982), the Court found that a gun shop had a duty to a wife killed after the shop provided a gun to her husband who was intoxicated. The Court reversed a summary judgment in favor of the gun shop, holding that a duty existed and issues such as "whether the injury fell within the ambit of that duty," *id.* at 934, and causation were for the jury. *Id.* at 934-35.

See also, *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009), *review denied*, 168 Wn.2d 1018 (2010) (applying common law duty principles, non-assailant graduating student who organized graduation keg party had no duty to non-graduating student killed by assault at party by another student in remote location in absence of evidence organizers knew of assailants' violent tendencies).

Here, of course, no criminal assault occurred; rather, Moravec's conduct was merely negligent and the same principles as pertain in negligent driving cases apply equally to negligent use of firearms. Moreover, the question of whether accidental injury caused by inebriated persons like Moravec who had blacked out from his overservice, is within the field of danger for bars overserving patrons apparently under the influence, overserving patrons to the point of helplessness, or with regard to patron-on-patron harm are for a jury.

The likelihood of intoxicated persons engaging in foolish, accidental actions as a direct result of their intoxication is foreseeable. Indeed, the public policy rationale for RCW 66.44.200 and the imposition of civil liability upon commercial sellers for harm occasioned by their overservice of patrons obviously under the influence is manifest.[19]

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[19] There is little question that civil liability bears a key role in deterring overservice by bars and drinking and driving. Tina Wescott Cafaro, *You Drink, You*

The language of RCW 66.44.200 *nowhere* restricts its scope to vehicle-related activities. Rather, the statute bans overservice *period*. The Liquor Act must be liberally construed to protect *the safety* of the people of our State, and that safety, too, is not confined to Washington's roads:

> This entire title shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose.

RCW 66.08.010.

While the Supreme Court in *Christen* concluded that the general field of danger for the duty arising under RCW 66.44.200 was to prevent "driver error," 113 Wn.2d at 503, that assertion is supported only by the fact that cases applying it involved motor vehicles. Nothing in the statute or its legislative history necessarily supports this conclusion. Certainly, in *Christen*, driver error was *a* purpose of the statute, not *the* purpose of it. Indeed, the dissent in *Barrett* strongly argued for such a reading. Justice Sanders stated that he was not persuaded that the intent of the Legislature in enacting RCW 66.44.200 was to forestall "driver error," in no small

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Drive, You Lose: or Do You?, 42 Gonz. L. Rev. 1, 19-20 (2006-07) (noting that the alcohol serving industry thrives on serving large amounts of alcohol, pushing alcohol on customers; civil liability for the consequences of doing so is a deterrent to drinking and driving). Empirical studies have established a connection between tougher civil liability standards and a drop in single vehicle night time injury crashes. *Id.* at 21 n.129. The rationale for deterrence of misconduct by third persons *in driving* applies with equal vigor to misconduct *in the use of firearms*.

part because:

> the legislature intended RCW 66.44.200(1) to be "liberally construed" to protect "the welfare, health, peace, morals, and safety" of Washington citizens. Laws of 1933, Ex. Sess., ch. 62, § 2, *codified at* RCW 66.08.010. "[T]he welfare, health, peace, morals, and safety" of Washington citizens are supported by the prevention of not only driver error, but also alcohol poisoning, public drunkenness, and disorderly conduct.

Barrett, 152 Wn.2d at 292.

In addressing the foreseeability of firearms accidents resulting from overservice of alcohol, Washington courts may appropriately assess information on the general availability of firearms, the diminished capacity of persons affected by alcohol, public health data, and their own common sense. The analysis is akin to that applied by our courts in considering legal causation.[20]

In *Schooley*, *supra*, the Supreme Court reversed the dismissal of a claim by a minor injured in a swimming pool accident against a store that illegally sold alcohol to a minor who then provided it to the plaintiff,

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[20] "Legal causation involves a determination whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant's act should go." *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008). The concept of legal causation involves considerations of "logic, common sense, justice, policy, and precedent." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985); *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley*, 134 Wn.2d at 478-79. "The question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter." *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243 (1992) (citing *Hartley*, 103 Wn.2d at 779-80).

rejecting the notion that the statute only protected the minor to whom liquor was illegally sold:

> The recognized purpose of legislation prohibiting the sale of alcohol to minors is to protect minors' health and safety interests from their "own inability to drink responsibly" and to protect against the particular hazard of "alcohol in the hands of minors." *Hansen*, 118 Wash.2d at 481-82, 824 P.2d 483. Because minors who drink commonly do so with other minors, protecting all those injured as a result of the illegal sale of alcohol to minors is the best way to serve the purpose for which the legislation was created, to prevent minors from drinking. Thus, we find that Schooley is part of the protected class.

Id. at 476. The Court also noted that it was foreseeable that minors would share alcohol with other minors. *Id.* at 477. For similar reasons, the Court rejected the store's legal causation argument.

> ... we conclude that legal cause is satisfied in this case. The injury suffered is not so remote as to preclude liability and the policy considerations behind the legislation are best served by holding vendors liable for the foreseeable consequences of the illegal sale of alcohol to minors. The policy behind the prohibition was not intended to protect only the one minor who purchases the alcohol. Minors often share alcohol with others and this prohibition was intended to also protect those minors which share in the fruits of the illegal sale.

Id. at 483.

Similarly, the bars owed a duty to Mortensen arising from their overservice of Moravec who was apparently under the influence to the point of later blacking out from inebriation. Courts should not give bars a

free pass to overserve patrons who kill or maim others in firearms accidents; it is readily foreseeable that persons who are inebriated from commercial sellers' overservice will harm themselves or others with firearms as much as it is foreseeable that they will do the same with motor vehicles.

Washington public policy makes a clear connection between excessive alcohol service and the potential harm from firearm accidents involving overserved patrons. For example, the Legislature fully understood the patent connection between the ingestion of alcohol and the risk of firearm-related deaths and injuries when, thirty years ago, it banned firearms in establishments serving alcohol. RCW 9.41.300(1)(d).[21] This Court need go no further than Initiative 1491, enacted overwhelmingly by Washington voters in the 2016 election. The people found in pertinent

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[21] In *Second Amendment Foundation v. City of Renton*, 35 Wn. App. 583, 668 P.2d 596 (1983), Division I upheld a city ordinance prohibiting firearms in taverns and bars as against a state constitutional challenge to such an ordinance as an infringement on the right to bear arms protected by art. I, § 24. Noting that such an ordinance was within a municipality's police power to reasonably regulate such action to protect public safety, health, morals, and general welfare; the ordinance was reasonably related to the ends sought to be achieved by the city. *Id.* at 586. Succinctly stated by the court: "The right to own and bear arms is only minimally reduced by limiting their possession in bars. The benefit to public safety by reducing the possibility of armed conflict while under the influence of alcohol outweighs the general right to bear arms in defense of self and state." *Id.* This case merely confirmed Attorney General opinions concluding that local jurisdictions could ban firearms in establishments serving liquor as an aspect of their police power. AGO 1982 No. 14. After the enactment of comprehensive firearms legislation in 1983, of which RCW 9.41.300(1)(d) was a part, the Attorney General reaffirmed local jurisdictions' authority to ban firearms in liquor establishments. AGO 1983 No. 14; AGO 1984 No. 27 (local jurisdictions could enact ordinances making if a crime for persons under the influence to be in possession of a firearm).

part:

> (2) Every year, over one hundred thousand people are victims of gunshot wounds and more than thirty thousand of those victims lose their lives. Over the last five years of which data is available, one hundred sixty-four thousand eight hundred twenty-one people in America were killed with firearms–an average of ninety-one deaths each day
>
> (3) Studies show that individuals who engage in certain dangerous behaviors are significantly more likely to commit violence toward themselves or others in the near future. These behaviors, which can include other acts or threats of violence, self-harm, or the abuse of drugs or alcohol, are warning signs that the person may soon commit an act of violence.
>
> (4) Individuals who pose a danger to themselves or others often exhibit signs that alert family, household members, or law enforcement to the threat. Many mass shooters displayed warning signs prior to their killings, but federal and state laws provided no clear legal process to suspend the shooters' access to guns, even temporarily.

Laws of 2017, ch. 3, § 1.

Moreover, readily accessible public health data documents the connection between overserved patrons and firearms accidents. Relying on data from the Center for Disease Control, the *Washington Post* reported that the over 33,000 gun deaths in the United States equaled the number of deaths caused by automobiles and that in the State of Washington gun deaths actually exceeded automobile deaths. Christopher Ingraham, "Guns are now killing as many people as cars in the U.S.," *Washington Post*, December 17, 2015. CP 239-41. *See also*, CP 537.

The Seattle King County Public Health Department reports that accidental firearms injuries and deaths are a serious reality:

- In 2013, among Washington state adults 18 years and older an estimated 36% (or 1,889,000 adults) have a gun in or around their home; of those reporting the presence of a firearm, more than half (51%) or about 971,000 report having an unlocked firearm. (WA State Behavioral Risk Factor Surveillance, System, 2013)[22]

- 1,472 Washington state residents were hospitalized for nonfatal gun injuries (294/year), including 277 children ages 19 and younger (55/year). (WA State Department of Health, Nonfatal Injury Data Tables, 2009-2013, October 2015)

- 3,038 Washington state residents died from a gun injury (607/year), including 191 children ages 19 and younger (38/year). (WA State Department of Health. Fatal Injury Data Tables, 2009-2013, October 2015)

- 436 King County residents were hospitalized for nonfatal gun injuries (87/year), including 82 children ages 19 and younger (16/year). (WA State Department of Health, Nonfatal Injury Data Tables, 2009-2013, October 2015)

- 642 King County residents died from a gun injury (128/year), including 35 children ages 19 and younger (7/year). (WA State Department of Health, Fatal Injury Data Tables, 2009-2013, October 2015)

http://www.kingcounty.gov/depts /health /violence-injury-prevention

[22] Firearms are very common in the area where this accidental shooting took place and across the State of Washington. While exact gun ownership numbers for Washington State are not available there were 2,539,863 recorded gun sales during the period 2000-16 in the state of Washington. CP 634-756 (spreadsheet of data from firearm sales by zip code/county, provided by Washington State Department of Licensing). The number of guns is likely much higher, with estimates of gross number of guns nearly equal to the number of people. CP 172-73. In the zip code for Battle Ground, 12.4% of adult residents have concealed carry permits. CP 237 (public disclosure data from the Department of Licensing outlining concealed carry permits by zip code).

/violence-prevention/gun-violence/LOK-IT-UP/firearm-facts.aspx. *See generally*, Seattle King County Public Health, *Gun Violence in King County* (2013).

In sum, the question of whether the bars' duty to Mortensen with regard to accidental misuse of firearms was foreseeable, a limiting factor on the scope of the bars' duty generally, was one for the jury.

F. CONCLUSION

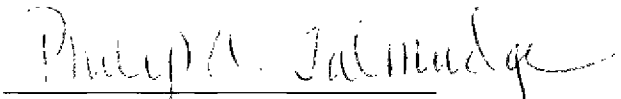
The trial court here misapplied Washington law on the duty of bars to third persons like Mortensen in fulfillment of their statutory obligation not to serve patrons like Moravec who are apparently under the influence and in its treatment of the bars' common law duty. As for the scope of the bars' common law or statutory duty, that foreseeability issue was for a jury.

Simply put, there is no rational reason why a bar that overserves an adult patron who is apparently under the influence to the point of helplessness is liable if that patron goes out and kills or injures others with a motor vehicle, but may not be liable if the instrumentality of the harm to third persons is a firearm.

This Court should reverse the trial court's duty decisions and direct that summary judgment be entered in Mortensen's favor and against the bars on duty. Costs on appeal should be awarded to Mortensen.

DATED this 13th day of January, 2017.

Respectfully submitted,



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APPENDIX

WSLCB

Washington State Liquor Control Board

HANDBOOK FOR LIQUOR LICENSEES

Spirits, Beer, and Wine Restaurant License

Tavern License

Beer and/or Wine License

Snack Bar License

Sports Entertainment Facility License

Nonprofit Arts Organization License

Motel License

Bed and Breakfast License

[redacted]

Washington State Liquor Control Board
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CHECK FOR SIGNS OF INTOXICATION

Licensees and their employees need to know the signs of intoxication. This handbook can help you recognize when a customer has had too much to drink. It is illegal to serve or sell alcohol to anyone who appears to be intoxicated. It is also illegal to allow anyone who appears to be intoxicated to possess or drink alcohol on your premises. When in doubt...don't serve alcohol. Serving alcohol to an intoxicated person can result in the loss of your liquor license and criminal charges.

(RCW 66.44.200 and WAC 314-11-035)

Federal and state laws prohibit discrimination against a person due to a disability. If a disability appears to explain a warning sign for possible intoxication, such as unsteady walking due to leg braces or drooping eyelids due to blindness, look for additional signs that may signal intoxication. Since some characteristics of certain disabilities may mimic signs of intoxication, only through diligent communication can you assure that individuals with disabilities are treated fairly. Do not be afraid to ask questions.

Remember, alcohol affects everyone differently. A person's level of intoxication may depend on how fast the person is drinking, the amount of food consumed, mood and other factors. Following are some of the most common signs of intoxication.

Lack of physical coordination

Spilling drinks can be a sign of intoxication, especially if it happens more than once. This may show that your customer has lost muscle control. Watch to see if the customer misses their mouth when raising their glass to drink.

Carelessness or clumsiness with money

Watch to see if your customer is dropping cash on the floor, has trouble picking it up or getting his/her wallet out, or cannot count out the right amount to pay for a drink.

Cigarette handling
Is your customer lighting more than one cigarette at a time, or lighting the wrong end? Look for cigarettes left forgotten and burning in ashtrays, this can be a clue to the customer's general state of awareness.

Unsteady walking
Watch for customers who are bumping into furniture or other customers.

Behavior changes

- Some customers who have had too much to drink will become loud, pick fights, and/or swear. Some will complain about your service, the cost of your drinks, or the way they were mixed.
- Some customers become very friendly when they are drinking. A person who becomes unusually entertaining and boisterous can be just as intoxicated as someone who is causing trouble. Watch for customers who are buying rounds of drinks for strangers. Excessive bragging may also be a giveaway.
- Keep an eye out for customers who lose their concentration and train of thought during conversation, or avoid eye contact. Look for bobbing heads or drooping eyelids.

Speech patterns
Talk to your customers. If you don't already know them, it will help you recognize any changes in their speech as they are drinking. Look for:

- Loud talking
- Bragging
- Arguing
- Swearing
- Complaining
- Slurred speech
- Talking slowly and deliberately
- A strong odor of alcohol

A summary sheet of this information is available from your local enforcement office. Be on the lookout for the first warning signs of intoxication. Early action on your part may prevent your customer from becoming a problem. Remember, it takes about one hour to take away the effect of one drink. Keep a mental note of how many drinks your customers have had.

PREVENTION STRATEGIES

Slow down service

Try to casually avoid the customer's table and delay ordering and serving drinks.

Suggest food

Eating slows down the absorption of alcohol into the body. Also, the time spent eating is time the customer is not drinking. Suggest high-protein foods like nuts, cheese, and meats. Avoid salty foods--salt makes people thirstier.

Suggest nonalcoholic drinks

You can suggest a nonalcoholic drink, such as a soft drink, juice, or coffee when you think a customer has had too much to drink. There are also many nonalcoholic wines and beers available today. (Don't compromise by serving a customer a watered-down drink. It is illegal to substitute a drink without the customer's knowledge. If a customer is intoxicated, it is illegal to serve him or her any alcohol.)

Get the customer's group to back you

Talk to the customer's friends at the table. You may help them recognize that their friend is in trouble. Also, friends can often be more persuasive.

Refusing service to a customer

Refusing alcohol service can be difficult. The key is to observe your customers carefully. Remember how dangerous an intoxicated customer is behind the wheel of a car. Patrons who aren't driving may be equally at risk walking, taking a taxi or riding with friends. Your decision not to serve an intoxicated customer not only could save your liquor license, it also could save someone's life.

When it's time to cut off service and remove a customer's drink:

- Establish and support a policy to back up servers who decide it is necessary to cut someone off. Train servers to notify the manager on duty when they are about to refuse service. Their decision may need back up if the customer gets angry.
- Be courteous, but firm. Be friendly, but don't back down on your decision or bargain with the customer. Let the customer know that you want him or her to get home safely.
- Remain calm and respectful. Avoid arguing. Don't provoke the customer by embarrassing him or her. Avoid statements like, "You're drunk" or "You've had way too much to drink."
- Let the customer know your job or license is at risk. Don't hesitate to tell the customer you could lose your license or job for overservice
- Find transportation. It's recommended that your business have a policy for getting intoxicated customers home safely. A cab service could be the right move for a customer who isn't drinking with friends or whose friends are also intoxicated.
- If the customer refuses to cooperate or becomes disorderly, call the police or sheriff and be willing to sign a complaint. Protect your business license and reputation.

Remember, state law does not prohibit intoxicated customers from remaining in the establishment as long as they are not consuming or possessing liquor or being disorderly. You may invite them to remain on your premises and encourage them to eat.

ALCOHOL IN THE BLOODSTREAM: WHAT'S LEGAL?

In Washington, a person cannot legally drive if his/her blood alcohol concentration is .08 percent or above. Alcohol affects everyone differently. The following charts may give you an idea of how many drinks can affect a Customer. Copies of these charts are available at no charge from your local liquor enforcement office. Remember, these charts are only guidelines.

The actual effect of alcohol on a person may depend on:

- How much food has been eaten
- Time of day
- The person's mood
- Mixer used in the drink
- Drugs in the bloodstream

NUMBER OF DRINKS PER HR.	PERCENT OF ALCOHOL IN BLOODSTREAM							
	BODY WEIGHT IN POUNDS							
	100	120	140	160	180	200	220	240
0	ONLY SAFE DRIVING LIMIT							
1	.05	.04	.03	.03	.03	.02	.02	.02
2			.07	.06	.05	.05	.04	.04
3						.07	.06	.06
4								
5								
6								
7								
8								
9								

This information is provided for general education purposes only. The blood alcohol levels indicated are based on average response to alcohol. Individual blood alcohol concentration levels will vary.

CHAPTER 8:
(MAST)MANDATORY ALCOHOL SERVER TRAINING

All licensees and employees of premises that serve alcohol for consumption on the premises must have a Mandatory Alcohol Server Training (MAST) permit. On-premises liquor licensees include restaurants, clubs, taverns, and sports/entertainment facilities. Employees must have their MAST permit within 60 days of employment.

Facts About MAST Permits

There are two types of MAST permits:

1) The Class 12 Mixologist Permit (must be at least 21 years old) is required for persons who:
   - manage persons who serve alcohol
   - work as a bartender
   - draw beer or wine from a tap
   - mix drinks

2) The Class 13 Servers Permit (must be at least 18 years old) is required for persons who:
   - take orders for beer, wine, or spirits
   - deliver drinks to a customer
   - pour beer or wine at a customer's table

Permits are good for five years, and must be available for inspection any time the permit holder is working. Permit holders must complete Mast Training classes every five years.
(WAC 314-17-015 and WAC 314-17-026)

MAST Training Classes

To get a MAST Permit, you must take a test from a trainer approved by the Board. The trainer will then issue the permit. There is a list of approved training providers on page 40. This list is kept current on the agency's web site: www.liq.wa.gov

CHAPTER 8:
(MAST)MANDATORY ALCOHOL SERVER TRAINING

MAST Violations

The Liquor Control Board issues penalties to MAST permit holders who violate liquor laws.

The standard penalty for a MAST violation ranges from a minimum of a 5-day permit suspension or $100 dollar fine to revocation of the permit. Following are examples of MAST violations:

- Sale or service of alcohol to persons under 21.
- Service of alcohol to an apparently intoxicated person, or allowing an intoxicated person to consume or possess alcohol.
- Service of alcohol after hours, or allowing alcohol to be consumed or possessed after hours.
- Allowing disorderly conduct on the licensed premises.
- Allowing minors to frequent a restricted area (such as a tavern or lounge).
- Obstructing a law enforcement officer and/or failure to allow an inspection.
- Failure to produce MAST permit and ID upon request.

Questions

For more information on MAST and authorized trainers, contact the Board's MAST Coordinator at (360) 664-1727.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Appellant in Court of Appeals, Division II Cause No. 49366-7-II to the following:

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Original E-filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 12, 2017, at Seattle, Washington.

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Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

January 12, 2017 - 2:04 PM

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